2001

Murray First Thrift and Loan Company v. John V. Benson : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT
OF THE STATE OF UTAH

MURRAY FIRST THRIFT & LOAN CO., a corporation, Plaintiff, vs. JOHN V. BENSON and EMILY SUE BENSON, Defendants,	)	Case No. 14634
MURRAY FIRST THRIFT & LOAN CO., a corporation, Third-Party Plaintiff-Appellant vs. GEORGE P. RUFF, Third-Party Defendant-Respondent.	)	

BRIEF OF RESPONDENT GEORGE P. RUFF

APPEAL FROM JUDGMENT
of the
DISTRICT COURT OF THE FIFTH JUDICIAL
DISTRICT IN AND FOR WASHINGTON COUNTY,
STATE OF UTAH

Honorable J. Harlan Burns, Judge

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IN THE SUPREME COURT
OF THE STATE OF UTAH

MURRAY FIRST THRIFT & LOAN CO., a corporation, Plaintiff, vs. JOHN V. BENSON and EMILY SUE BENSON, Defendants, MURRAY FIRST THRIFT & LOAN CO., a corporation, Third-Party Plaintiff-Appellant vs. GEORGE P. RUFF, Third-Party Defendant-Respondent.	Case No. 14684

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BRIEF OF RESPONDENT
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STATEMENT OF THE NATURE OF THE CASE

Appellant appeals from that portion of the Judgment and Order of Dismissal entered by the Trial Court on April 22, 1976, wherein the Court dismissed with prejudice Counts II and III of the Third-Party Complaint and appeals from an Order of the Trial Court denying Appellant's Motion to Amend Judgment and Motion for Relief from Judgment.

DISPOSITION IN LOWER COURT

A final Order, dismissing with prejudice, the third-party

Plaintiff-Appellant's complaint against the third-party defendant-respondent was entered by the Court on March 9, 1976 after the jury had been impaneled, and the trial had begun, as a consequence of a settlement during trial reached between the plaintiff and defendant during the noon recess and after the plaintiff as third-party plaintiff had advised the Court it was not prepared to proceed to trial against the third-party defendant. Thereafter, on May 5, 1976, third-party plaintiff-appellant filed a Motion to Amend Judgment and a Motion for Relief from Judgment. Following the hearing on the said Motion to Amend Judgment and for Relief from Judgment, the lower court denied third-party plaintiff-appellant's motions.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the Trial Court's final Order of Dismissal with prejudice, and the Trial Court's ruling in denying Appellant's Motion to Amend Judgment and Motion for Relief From Judgment.

STATEMENT OF THE CASE

Plaintiff, Murray First Thrift, (hereinafter MFT) filed a Complaint against John V. and Emily Sue Benson (hereinafter Bensons), on November 15, 1974, in the District Court of Washington County, State of Utah. (R 1.) The Complaint was based upon a series of loan transactions between MFT and Bensons.

On January 20, 1975, Bensons filed an Answer and Counterclaim (R 125-135) and on February 10, 1975, Bensons filed an Amended Answer and Counterclaim. (R 136-138) Thereafter, extensive

discovery was undertaken by both sides. Finally, on October 10, 1975, just three and one-half months prior to the original date set for trial, and 11 months after the case had been originall filed, MFT filed a third-party Complaint against George Ruff an individual, as third-party defendant. (R 139-156).

The third-party defendant-respondent, George Ruff, had worked for MFT in various positions but was fired by MFT in February 1974. March 9, 1976 Proceedings, p. 28. At the time of trial, George Ruff was working as an employee for his church. March 9, 1976, Proceedings, p. 22.

Appellant's Third-Party Complaint against George Ruff, respondent, sought recovery from George Ruff of 1) any funds MFT may have to pay Bensons on the Counterclaim by Bensons as a result of alleged actions by George Ruff, 2) any funds MFT may be unable to collect from Bensons due to George Ruff's failure to fulfill and discharge his duties, and 3) conversion of more than $10,000.00. (R 139-145.) Because of MFT's "11th hour" efforts to involve George Ruff as a third-party defendant, and with the trial date already set when the third-party complaint was filed,third-party defendant, Ruff, (hereinafter respondent) was forced to do a great and burdensome amount of discovery in a short period of time in order to prove he did not convert MFT funds to his own use and that all of his actions and conduct of business were consistent with business practices of appellant MFT. Discovery on respondent's part was extremely complex and

costly as a great deal of accounting work had to be done with records of the appellant, in addition to collecting and evaluating numerous documents in the possession of MFT. March 9, 1976, Proceedings, p. 11, 33.

At the beginning of the trial with the jury impaneled, an opening statement by each party to the action was made, whereupon the court ordered a noon recess. Upon returning to the courtroom, respondent learned that during the recess plaintiff-MFT and defendants-Benson had compromised and settled their claims against one another. (R 30-33). Only after all parties were in St. George, Utah, and were in trial of the case did MFT and Bensons discuss settlement.

According to the stipulation read into the record, defendants-Benson agreed to transfer to plaintiff-MFT the apartment complex which respondent, as employee of MFT, had taken as security for the various MFT loans to Benson, whereupon the court ordered dismissal of MFT's Amended Complaint and Benson's Counterclaim. March 9, 1976 Proceedings, p. 31-35. MFT as third-party plaintiff stated to the Court that Count One of the Third Party Complaint against third party defendant-respondent Ruff was now moot, and then requested that Counts Two and Three be dismissed without prejudice stating that MFT will not know ..." until we have liquidated the Benson property whether, and to what extent Murray has been injured ... by Mr. Ruff." March 9, 1976, Proceedings, p. 33.

At this point, counsel for respondent demanded his day in court. The following dialogue took place:

MR. CASSITY (for Respondent-third party defendant - Ruff): Your Honor, I have almost unbelievable expense because of the complications, that detail, which the Court hasn't been subject to, unfortunately, as of this moment. The third-party defendant, George Ruff, is prepared to try this case, has spent a considerable amount of money subpoenaing witnesses out of Salt Lake City, as well as other areas, and is here prepared to proceed relative to all claims in these proceedings against this defendant and we are here and we intend to go forward and any settlement notwithstanding these parties we are going to pursue until this matter is either disposed of by judgment or verdict in this case or by dismissal with prejudice as to all claims against this defendant.

THE COURT: There is no objection to the dismissal; on the other hand, you claim it should be with prejudice and not without prejudice?

MR. CASSITY: I have no objection to any other provisio except in regard to Count 2 and Count 3, as stated by Mr. Ferrari, where he moves that they be dismissed without prejudice. I insist on my day in Court and it is here.

THE COURT: And you are ready to go?

MR. CASSITY: I am, sir.

THE COURT: All right, I will hear you, Mr. Ferrari.

MR. FERRARI: Well, you Honor, Count 2 and 3 are counts, claims for damages resulting from Mr. -- from Mr. Ruff's wrongful acts in connection with the Benson trust actions. We have now through this settlement obtained, or will obtain, title to real property of indeterminate value. It is quite possible that the liquidation of this property will leave us without damages, therefore, to go forward with a claim against Mr. Ruff at this time --

THE COURT: You can't go forward now is what you are saying?

MR. FERRARI: That is correct.

March 9, 1976 Proceedings, p. 33-34.

Thus, after 16 months of preparation, arrival of trial date in St. George, Utah, impaneling of a jury, opening statements at trial having been made, and "literally minutes before evidence would have been presented to the jury", (Appellant's Brief, p. 4) appellant was unwilling to go forward as stated by their own counsel. No reason was given by appellant counsel why the issue of liability on the second count and the third count could not have been tried and decided at that time, but for refusal of appellant to proceed.

Following the order of the court dismissing the Third-Party Complaint with prejudice, the Court said," ... the Court

inquired as to your ability to go forward. This is the time set for trial. You indicated you could not. That's the ruling of the Court, prepare appropriate pleadings." March 9, 1976 Proceedings, p. 35. Thus, because of appellant's failure and refusal to go forward at the time of trial, the Judge dismissed the Third-Party Complaint with prejudice.

ARGUMENT

THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN DISMISSING PLAINTIFF'S THIRD-PARTY COMPLAINT WITH PREJUDICE

The dismissal with prejudice by the lower court was pursuant to the Utah Rules of Civil Procedure, Rule 41(a)(2) which provides in part that "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." The vast majority of the Federal Courts interpreting the Federal equivalent of this rule have held that the trial court is granted broad discretion to grant or deny a 41(a)(2) motion and to impose such conditions as it deems just.

For example, the court in Butler v. Denton, 150 F.2d 687 (10th Cir. 1945) held;

> Under the Rule, the court is vested with a reasonable discretion in the matter of dismissal after the filing and service of the answer... And the action of the court in respect of dismissal will not be disturbed on appeal unless the discretion has been abused. 150 F.2d at 690. (Emphasis added)

The New Mexico Supreme Court, interpreting an identical statute, was of the opinion that the decision of the lower court with respect to voluntary dismissal,

> Is a matter of Judicial discretion, the exercise of which will not be disturbed on appeal in the absence of clear abuse. (Emphasis added) Emmco Insurance Company v. Walker, 57 N.M. 525, 260 P.2d 712, (1953).

The record shows the following aspects of the case upon which the ruling of the court can be justified:

1. Advanced stage of proceedings. The farther along in proceedings that the plaintiff's motion for voluntary dismissal is made, the more obligated the court is to deny it. In Paturzo v. Home Life Ins. Co., 503 F.2d 333 (4th Cir. 1974), the Fourth Circuit Court of Appeals summed up its position as follows:

> Furthermore, we found that the denial of a plaintiff's motion voluntarily to dismiss would not have been an abuse of discretion, "In view of the advanced stage of the proceedings." Citing Armstrong v. Frostie Company, 453 F. 2d 914 (4th Cir. 1971) at 916. Likewise, in Young v. John McShain, Inc., 130 F.2d 31 (4th Cir. 1942), we indicated our hesitancy in granting a voluntary dismissal where the action has progressed to or beyond the trial stage. Id. at 335 (Emphasis added)

In Shaffer v. Evans, 263 F.2d 135 (10th Cir. 1958), a District Court had dismissed the plaintiff's case with prejudice when the plaintiff declined to go forward after its motion for dismissal without prejudice was denied. The Court of Appeals upheld the lower court's ruling stating:

> This action has been pending for some six months at the time of the hearing of the plaintiff's motion to dismiss. Depositions had been taken, the defendant had made arrangements for medical testimony, a pre-trial conference had been held. The case had not been set down for trial but apparently was ready for trial at the next jury term. Requiring the plaintiff to proceed under those circumstances in the court in which he had filed his action could hardly be termed arbitrary. Certainly, no reason prejudicial to his substantive rights was suggested for dismissal, and the trial court did not abuse its discretion in denying the motion.

The motion for voluntary dismissal made by MFT was not made until the jury had been impaneled and the opening statements had been made by the respective counsel for MFT - plaintiff-appellan defendants and third-party defendant-respondent.

2. Hardship as a result of expense and delay. Courts in deciding a 41(a)(2) motion may consider the expense invested by the defendant in preparation for trial. In Cincinnati Traction Building Company v. Pullman Standard Car Manufacturer Company, 25 F. Supp. 332, (D. Del. 1938), the Delaware District Court held that where depositions have been taken and where

> Plaintiff has chosen the forum and has required defendant to answer and prepare its defense at great expense,... [the] defendant is entitled to have the controversy finally adjudicated so that it may definitely know its rights.

Another district court in Roth v. Great Atlantic and Pacific Tea Company, 5 FRServ. 41 a.22 case 3 (S.D. Ohio 1942) reasoned as follows:

> The defendant, by its counsel, has made affidavit that it has expended the sum of two thousand dollars ($2,000.00) in its defense of this suit. Under such circumstances the court would abuse its discretion in granting plaintiff's motion for dismissal and relegating the defendant a few dollars by way of cost. (Emphasis added)

The instant case, as alluded to by all parties in their opening statements, involves a very complex set of facts including a great deal of accounting minutia, the preparation of which led to what counsel for the third party defendant-respondent referred to as "almost unbelievable expense." Furthermore, MFT, by choosing a distant forum (St. George, Utah) imposed much additional expense on the defendant (a resident of Salt Lake City).

Courts may also consider the potential hardship resulting from a delay in resolving the issue presented by a case. A Federal District Court in California in Golconda Petroleum Corporation v. Petrol Corporation, 46 F. Supp. 23, (S.D. Cal. 1942) argued that the granting of plaintiff's voluntary motion for dismissal

> Would result in an action being commenced in the State Courts with considerable delay in deciding the issues. This would create a hardship and courts are jealous of avoiding such a result. (Citing cases) (Emphasis added)

Appellant in its third-party complaint alleged wrong doing by respondent including conversion in excess of $10,000.00. Defendant was prepared at the time of trial to go forward, to meet the allegations and to prove them to be false.

It would have been distinctly detrimental to respondent to delay the opportunity to prove himself innocent of the serious charges made by MFT.

The Washington County District Judge was also aware that the sums involved were comparatively large, that the respondent was a former loan officer at MFT who had lost his job and who was at the time of the trial, working for his church. To allow a possible judgment for potentially large sums of money to hang over the respondent's head undecided for an indefinite period of time would work a significant hardship where the respondent necessarily was already prepared, present in court, and able to litigate the issues at a trial which had already begun. The burden of uncertainty which granting of appellant's Motion

would have placed upon respondent defendant was itself sufficient reason for exercise of discretion by the court below.

3. Appellant declined to go forward. The trial transcript at page 34, line 24 reveals the following dialogue:

> COURT: You can't go forward now is what you are saying?
>
> MR. FERRARI: That is correct.

The Court after announcing that the case was dismissed with prejudice stated its reason as follows:

> ... on the other hand the court inquired as to your ability to go forward. This is the time set for trial. You indicated you could not. That's the ruling of the court, prepare appropriate pleadings. March 9, 1976, Proceedings, p. 35, beginning at line 18. (Emphasis added)

In Shafer v. Evans, supra., the Tenth Circuit Court of Appeals upheld the dismissal with prejudice by a district court where the plaintiff had "declined to proceed" after his motion for voluntary dismissal was denied.

In the instant case where grounds were apparent for the denial of appellant's motion for voluntary dismissal and where the appellant had manifested its unwillingness to proceed on the merits, dismissal with prejudice was completely appropriate.

4. The court's ruling was one of several reasonable alternatives and the appellant failed to provide the court with its now suggested alternative. The appellant alleges that the lower court abused its discretion by not choosing

to grant the appellant's motion for dismissal without prejudice subject to the conditions that appellant would pay any additional costs incurred by the respondent in an additional trial. This proposal made by the appellant is one of a number of alternatives which the court could have chosen. Assuming arguendo that the alternative suggested by the appellant was the best alternative, it is still not an abuse of discretion for a court to fail to opt for the best of all possible alternative courses of action. To hold otherwise would be a holding that a court has no discretion in the matter at all.

The case of Alamance Industries Incorporated v. Filene's 291 F.2d 142 (1st Cir. 1961) is cited by Third Party plaintiff-appellant for the proposition that courts when ruling on a 41(a)(2) motion should "impose curative conditions." In that case the plaintiff had suggested to the trial court the conditions upon which it should have dismissed the action. Respondent points out that the "curative conditions" upon which the Court of Appeals held that case should have been dismissed, were in the circuit court's opinion equivalent to dismissal with prejudice. (291 F.2d 145).

5. Appellant's suggested reason for inability to go forward on the merits was not sufficiently compelling. Appellant suggests to this court that it could not go forward on the merits because it was not yet certain of its damage. The damage issue was

only a fraction of the issues placed before the court by the litigation between third party plaintiff-appellant and third party defendant-respondent. Appellant was claiming in its third party complaint that respondent had converted more than $10,000.00 of its funds to his own use. This claim was in no way affected by the settlement between plaintiff and defendants. Also, the most difficult and complex issue of appellant damage claim was that of liability. Appellant gave the trial Judge no reason whatsoever for not proceeding on these issues.

In addition, in almost any lawsuit, damages are not liquidated in advance of trial to the exact penny. Nevertheless, a plaintiff is usually required to show damages as best he can at the time of trial. For example, in a personal injury action the exact amount of damage cannot be determined until the plaintiff's death brings an end to medical bills, lost wages, and pain. It would be absurd to contend that because of this uncertainty the claim in a personal injury case could not be litigated until the plaintiff dies.

Further, appellant's ability to show its damage was not inhibit by its settlement with the defendants-Benson, but was rather improved by a significant narrowing of the issues involved. Appellant could not have known what its actual and exact damages were when it first brought its claim against the third-party defendant-respondent. Its actual damages could not be determined until the court decided liability and recovery as between MFT and the Bensons, judgment was entered, and the judgment was

collected or written off as uncollectible. There was no guarantee that the Bensons were sufficiently solvent to cover any judgment which may have been had against them, and an evaluation of the Benson's ability to pay a judgment entered against them would necessarily have involved the valuation and/or liquidation of their primary asset, the apartment complex which appellant accepted in settlement. Thus, appellant, absent the settlement, would have had to proceed through the entire trial and collection proceedings before it would have any hope of showing exactly what damage, if any, it had suffered as a result of the third party defendant-respondent's "alleged" wrong doing.

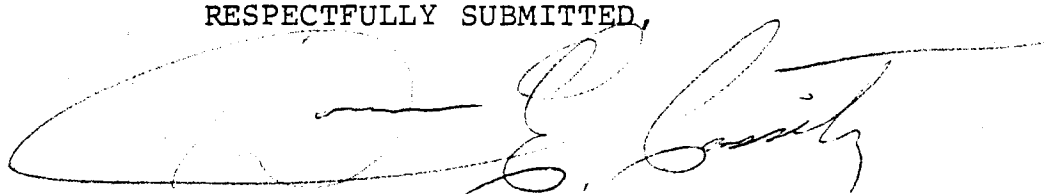
Appellant did not choose to wait until its damage was exactly defined before it brought its claim against the respondent. Rather, it chose to involve the respondent in the litigation of this issue, thus forcing the respondent to defend against said claim and to face the same uncertainties as the appellant. Respondent, at trial, was prepared to litigate all issues raised by the third party plaintiff-appellant the day of the trial. Appellant's whining after the beginning of the trial, that it could not proceed on the merits because it could not determine with certainty what its actual damages were, was inconsistent with the initiation of its claim against respondent in the first place. Therefore, appellant's argument was not sufficiently compelling to be given significant weight by the trial court. For the Court to have considered appellant's

explanation otherwise, would fly in the face of the notions of justice and fair play.

CONCLUSION

Given the great expense respondent had incurred to prepare for trial; the stage of trial proceedings at which time the motion of appellant was made; the burden of uncertainty that the respondent would have to bear, if the court ruled for the appellant; and given the fact that appellant stated its inability to proceed; the lower court's dismissal with prejudice was within the permissible bounds of discretion and should be upheld.

RESPECTFULLY SUBMITTED,



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CERTIFICATE OF MAILING

I hereby certify that on this 9th day of November, 1976, I mailed two (2) copies of the foregoing Respondent's Brief to Ricardo B. Ferrari, and John A. Snow, at their office at 141 East First South, Salt Lake City, Utah, postage prepaid thereon.